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In The

Supreme Court of the United States

October Term, 1995

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION NO. 28,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and CITY OF NEW YORK,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR THE PETITIONER

EDMUND P. D'ELIA
20 Exchange Place
New York, NY 10005
(212) 269-3233

CHARLES J. COOPER*
ROBERT J. CYNKAR
DAVID H. THOMPSON
SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF FOR THE PETITIONER

This Title VII case is now halfway through its third decade. For the last 20 years, Local 28's activities have been closely monitored by a full-time, court-appointed Administrator, "who is in effect a receiver with power, *inter alia*, to govern Local 28 so far as the recruitment and admission of minorities to the union and the referral of apprentices to jobs are concerned." *EEOC v. Local 638*, 753 F.2d 1172, 1189 (2d Cir. 1985) (Winter, J., dissenting). For the last 10 years, the Union has voluntarily indentured into its apprentice program (the entry point for over 90% of all new members) three nonwhites for every white in an affirmative effort to achieve its 29.23% nonwhite membership goal – a "goal" upheld in 1986 by this Court on the express understanding that it would be applied as a "flexible" and "temporary" "benchmark" that would "terminate when [Local 28] achieve[d] the membership goal." *Local 28 v. EEOC*, 478 U.S. 421, 478-79 (1986).

Because of depressed economic conditions in New York City's construction industry in recent times, progress toward achievement of the 29.23% nonwhite membership goal has been slower than expected, but it has been steady. By March 1993 nonwhite Union membership had risen to 24.13%, Pet. App. 69a, and by the time that the district court's contempt finding had reached the court of appeals, nonwhite Union membership stood at 25.51%. Affidavit of Robert P. Mulvey submitted July 24, 1995, in support of Contractors' Associations' Stay Motion. Thus, this 25-year-old case, along with the sweeping, race-conscious remedial measures that it has generated, should finally be entering its ninth inning. The district court's contempt ruling, however, will ensure that

this case will continue long into the future, until Local 28 achieves a new, *higher* nonwhite membership goal, raised to account for the increase since 1970 in the percentage of nonwhites living in the New York City area (as reflected in the 1990 census, which shows that blacks and Hispanics now account for just under 50% of New York City's total population). And many years from now, when achievement of the new membership goal is in sight, the courts below will presumably require that the goal be raised yet again, to account for the population growth of nonwhites in the New York City area that is certain to take place in the 1990's.

The rulings below amply warrant this Court's review. The district court's contempt finding has fulfilled Justice O'Connor's prophecy that the 29.23% nonwhite membership goal would operate "as a rigid membership quota, which will in turn spawn a sharp curtailment in the opportunities of nonminorities to be admitted to the apprenticeship program." *Local 28*, 478 U.S. at 497-98 (O'Connor, J., dissenting). More importantly, the Sisyphean task imposed on Local 28 of achieving an ever-increasing nonwhite membership goal governed by the shifting demographics of New York City should apply no less to the countless other Title VII cases throughout the country in which remedial orders containing race-conscious relief have been in place for many years and are nearing fulfillment.

Respondents City of New York ("City") and the Equal Employment Opportunity Commission ("EEOC") do not deny that the ruling below will ensure that this case continues into the foreseeable future. Their response, in essence, is simply that the Union deserves it. Several

factual mischaracterizations and legal flaws in Respondents' briefs in opposition warrant brief replies.

1.a. Respondents argue that the district court did not really hold Local 28 in contempt for its failure to meet the 29.23% nonwhite membership goal, but rather merely treated the failure as evidence that Local 28 had otherwise discriminated against nonwhites. Respondents rely on the district court's statement that it viewed "the union's failure to meet the goal as a symptom of its refusal to stop discriminating against nonwhites in admission to the union and in the provision of equal job opportunities to journeypersons, and it is on this discrimination, not on the failure to meet the membership goal, that the contempt finding is based." Pet. App. 75a-76a.

The district court's statement, however, equates the Union's failure to meet the goal with discrimination against nonwhites in admission to the Union. And the court pointed to no other evidence of the Union's alleged "refusal to stop discriminating against nonwhites in admission to the union," which is hardly surprising in light of the undisputed fact that the Union has for 10 years discriminated, on a three-to-one basis, *in favor* of nonwhites in admission.[1] In equating failure to achieve

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[1] The City maintains that Local 28 should not be given any credit for this recruitment policy and that the Joint Apprenticeship Committee ("JAC") is solely responsible for this accomplishment. Yet, the City conveniently fails to acknowledge that Local 28 has itself been held in contempt for underutilizing the apprenticeship program in the past; that the district court explicitly criticized the Union for "stack[ing] the apprenticeship program with nonwhites"; Pet. App. 144a; and that the Second Circuit revised the original order imposed

the goal with discrimination against nonwhites, the district court was merely applying the theory of discrimination that it has applied throughout this case. According to the district court, "if the union and the [Joint Apprenticeship Committee] had not discriminated against nonwhites, the union would contain the same percentage of nonwhites as exists in the relevant labor force." Pet. App. 75a. To the district court, therefore, finding that the Union had failed to achieve the 29.23% nonwhite membership goal within the prescribed time was *the same as* finding that the Union had discriminated against nonwhites. Indeed, the district court said as much. In summarizing his ruling, Judge Carter expressly stated that he had found Local 28 in contempt on four grounds, including that "the Union had failed to achieve a goal of 29.23% nonwhite membership. . . . " *EEOC v. Local 638*, No. 71 Civ. 2877 (RLC), slip op. at 1-2 (S.D.N.Y. June 7, 1995) (opinion denying stay).

The district court plainly held Local 28 in contempt for failing to meet its nonwhite membership goal, and it was on this finding alone that the district court ordered that the goal be raised to account for demographic shifts reflected in the 1990 census. And the district court was unmoved by the undisputed fact that depressed economic

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against Local 28 requiring an indenture ratio of one nonwhite for every white. Thus, the history of this litigation makes it unmistakably clear that Local 28 must be given credit for its diligent efforts to meet the membership goal through its recruitment of nonwhites into the apprentice program, which is after all "the main route to membership," Brief of the City ("City Br.") at 4, just as it has been held accountable for any shortcomings in its admission policies.

conditions in the sheet metal industry had slowed achievement of the goal, noting simply that the Union had not shown that such conditions were unforeseeable when it agreed to meet the goal by August of 1992. Pet. App. 73a. Thus, the "flexible" and "temporary" "benchmark" upheld by this Court 10 years ago has now been enforced as an impermissible, rigid, and effectively permanent quota.

b. Respondents argue that even if the district court found Local 28 in contempt for failing to achieve its nonwhite membership goal, the court of appeals' affirmance was based "on grounds other than the union's failure to attain the membership goal." Brief of the EEOC ("EEOC Br.") at 10 (quoting Pet. App. 15a). To be sure, the court of appeals did not explicitly affirm the district court's finding that Local 28's failure to achieve the membership goal placed the Union in contempt. But neither did the court of appeals reverse this contempt finding. Rather, the court of appeals simply acted on that finding by affirming the only remedial consequence that the district court had attached to its finding that the Union had failed to achieve its membership quota – the order requiring that the membership goal be raised in light of the 1990 census and that it be applied separately to journeypersons and apprentices rather than to the membership as a whole.[2]

The court of appeals justified its affirmance of the district court's order raising the nonwhite membership

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[2] This bifurcation of the goal effectively increased the membership goal, and it is uncontested that Local 28 objected below to the raising of the goal. Pet. App. 27a; Brief of Local 28 at 48; Reply Brief of Local 28 at 23.

goal solely by pointing to the "large shifts in Local 28's membership . . . since the goal was last modified." Pet. App. 32a-33a. This circumstance was alone sufficient, according to the Second Circuit, to bring the order within the district court's "broad discretion to adjust the membership goal when circumstances warrant." Pet. App. 32a. Neither the district court nor the court of appeals related the adjustment of the membership goal to the Union's recordkeeping practices, its reinitiation policy, or the hours disparity between white and nonwhite journeypersons, and Respondents' suggestions to the contrary are simply in error. EEOC Br. at 10-12; City Br. at 19.

In any event, it could not be clearer that the demographic changes in New York City since 1970 are in no way related to, let alone attributable to, Local 28's activities. The district court's order requiring the Union to correct racial imbalance caused by those demographic shifts is thus plainly beyond " 'the permissible scope of federal judicial power.' " *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 399 (1982) (quoting *Hills v. Gautreaux*, 425 U.S. 284, 294 n.11 (1976)). The sole purpose of raising the membership goal, therefore, is an impermissible one – attaining "a particular racial balance in the workplace . . . for its own sake." *Local 28*, 478 U.S. at 487 (Powell, J., concurring).

2.a. Respondents seek to divert attention from these points by emphasizing that Local 28 stipulated in the district court that the membership goal should be recalculated in light of Local 28's recent demerger with Local 10, a local serving the northern New Jersey area. Respondents argue in essence that because the goal had to be recalculated to account for the demerger of Local 10, it

might as well be recalculated to account for the population growth of nonminorities since 1970. But Local 28 stipulated to a recalculation of the goal to account for the demerger because it was responsible for this change in its jurisdiction. Local 28 was in no way responsible, as we have discussed above, for the changes in New York City's demographics since 1970. Indeed, in 1983, when Local 28 voluntarily merged with Local 10, it similarly agreed that a recalculation of the goal was warranted to account for the expansion of its jurisdiction. But no one, including Respondents, suggested at that time that the nonwhite membership goal should be recalculated to account for the increase in New York City's nonwhite population as reflected in the 1980 census. It is also noteworthy that in 1983 the district court accounted for the merger by raising the nonwhite membership goal from 29% to 29.23%. The relatively modest significance of this previous recalculation contrasts starkly with the dramatic increase that would result from a requirement that the goal be raised to mirror New York City's increased nonwhite population, which stood at 49.6% in the 1990 census.[3]

b. Respondents' attempt to reconcile the Second Circuit's holding here with the Eleventh Circuit's decision in *United States v. City of Miami*, 2 F.3d 1497 (11th

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[3] The Respondents do not contest the accuracy of this citation to the census figures. Rather, they suggest that the formula used by the district court in arriving at the original membership goal was based on more detailed information. While this is true, the Respondents present no plausible reason for assuming that application of this formula would lower or otherwise substantially change the 49.6% figure derived from the 1990 census.

Cir. 1993), is equally unavailing. In *City of Miami*, the Eleventh Circuit made clear that "[w]ork force parity may never be achievable because of shifting demographics and imbalances in the numbers of qualified applicants. . . . " 2 F.3d at 1508. The factual similarities between these two cases underscore the sharply divergent approaches of the Second and Eleventh Circuits. In both instances, the unions pursued aggressive preferential admission policies in an attempt to meet their membership goals. Moreover, in both cases, these preferential policies were voluntarily adopted and were in effect for over a decade. Thus, in neither case can it be seriously maintained that the unions were engaged in ongoing discrimination with respect to their membership policies.

3. Respondents defend the lower court's contempt finding with respect to the hours disparity between white and nonwhite members as a narrow, fact-bound question that does not warrant this Court's review. EEOC Br. at 14-15; City Br. at 21-24. As we demonstrated at length in our petition, however, the contempt finding with respect to the hours disparity is predicated on several serious legal errors. Pet. at 22-29. Respondents do not even address, let alone rebut, these legal points, and so we have nothing to reply to. Similarly, Respondents' opposition briefs make no effort to respond to the detailed discussion in our petition concerning the palpably deficient evidence on which the courts below concluded that the hours disparity was partially attributable to the conduct of Local 28. In the exceptional circumstances of this case, and in light of the fundamental nature of the rights

implicated by the decision below, even this factual issue is worthy of this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EDMUND P. D'ELIA
20 Exchange Place
New York, NY 10005
(212) 269-3233

CHARLES J. COOPER*
ROBERT J. CYNKAR
DAVID H. THOMPSON
SHAW, PITTMAN, POTTS
& TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

* *Counsel of Record*

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